Further, Petitioners cited numerous cases where courts in other Circuits compelled arbitration of fraudulent inducement-type claims where the applicable provision was almost identical to the provision at bar. *See Mar-Len of Louisiana, Inc. v. Parsons-Gilbane*, 773 F.2d 633, 636 (5th Cir. 1985) ("with respect to the interpretation or performance"); *Schacht v. Beacon Ins. Co.*, 742 F.2d 386, 391 (7th Cir. 1984) ("with respect to the interpretation of this Agreement or the performance of the respective obligations of the parties"); *RCM Tech., Inc. v. Brignik Tech. Inc.*, 137 F. Supp. 2d 550, 555 (N.J. 2001) ("as to interpretation of"); *Integrated Health Serv., Inc. v. Kirschenbaum*, 1996 U.S. Dist. LEXIS 3165, *17-18 (N.D. Ill. 1996) ("concerning the interpretation or performance of any provision"); *Hannah Furniture Co. v. Workbench, Inc.*, 561 F. Supp. 1243, 1244-45 (W.D. Pa. 1983) ("involving questions of interpretation of"); *J.P. Stevens & Co., Inc. v. Harrell Int'l, Inc.*, 299 So.2d 69, 70 (Fla. 1st DCA 1974) ("the effect or interpretation of any terms or provisions"); *see also Matthews*

(Cont'd)

disputes unless expressly excluded, the Ninth and Second Circuit Courts must subjectively determine whether a clause is narrow or broad, and such subjective determination results in inconsistent and unpredictable decisions. Thus, for example, "arising under" and "arising hereunder" are deemed "narrow" by the Ninth and Second Circuits (thereby depriving an arbitral forum to fraudulent inducement claims), but "arising out of" and "arising hereunder" are deemed sufficiently broad by the Sixth and Eleventh Circuits to support sending fraudulent inducement claims to arbitration. *See, e.g., Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc.*, 350 F.3d 568, 578 (6th Cir. 2003); and *Gregory v. Electro-Mech. Corp.*, 83 F.3d 382, 383-85 (11th Cir. 1996). A litigant (or person seeking to avoid litigation) has no way of knowing if the language in her arbitration clause will later be deemed broad enough to accomplish the arbitral goal. Or, worse, will find out that it was not broad enough only after an arbitration award has been entered and substantial fees incurred.

v. Rollins Hudig Hall Co., 72 F.3d 50, 54 (7th Cir. 1995) ("relating to a breach of this agreement"); *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 813-14 (4th Cir. 1989) ("believed to constitute a breach or violation").

None of these cases were addressed in the Opposition. The Petition demonstrates that there is a split between Circuits where, in contrast to the majority view, the Ninth Circuit and Second Circuit reverse the presumption in favor of arbitration. In these two Circuits, parties are able to avoid any but the broadest contractual arbitration provisions by alleging that a contract was fraudulently induced. This Court should resolve this split and explicitly state that unless expressly excluded, fraudulent inducement claims fall within the scope of contractual arbitration provisions.

IV. THERE ARE NO ADEQUATE AND INDEPENDENT STATE LAW GROUNDS FOR THE LOWER COURT'S DECISION

The lower court specifically stated that it did not have an alternative state law basis for its decision. *See* App. A at 10a. While Respondents had argued, as they do in their Opposition, that they could not be bound to arbitrate their fraudulent inducement claims, the Court of Appeal specifically stated that it would "assume" that Respondents were either parties to, or intended beneficiaries of, the agreement containing the arbitration provision. The court also noted that it "need not reach the merits of" Respondents' contentions that they could not be bound by the arbitration provision. *See id.* at 10a and 17a, n.12. Again, the ***only*** basis for the appellate court's decision reversing the judgment confirming the arbitration award was that the dispute was beyond the scope of the applicable arbitration provision.

Even if the decision below applied an independent state law ground, such state law would not adequately support the lower court's decision. As the trial court properly found, although Respondents did not sign the merger agreement containing the arbitration provision, they were properly bound by it. Indeed, California law provides numerous bases under which Respondents would be bound. *See, e.g., NORCAL Mutual Ins. Co. v. Newton*, 84 Cal.App. 4th 64 (2000) (nonsignatory bound under estoppel theory); *Mormile v. Sinclair*, 21 Cal.App.4th 1508, 1511 (1994); *Harris v. Superior Court*, 188 Cal.App.3d 475, 479 (1986). Moreover, the mere fact (as asserted by Respondents) that the court below *might* have invoked state law grounds to overturn the judgment does not foreclose this Court's jurisdiction.

CONCLUSION

The Federal Arbitration Act should be uniformly applied in every Circuit, giving great weight to the policy in favor of arbitration. However, the Ninth and Second Circuits reverse the presumption in favor of arbitrability when faced with something less than a subjectively "broad" arbitration provision. The uneven application of this exception provides no real guidance to future courts and litigants. Petitioners therefore respectfully request that the Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

CHARLES H. DICK, JR.
KATHERINE A. BACAL*
BAKER & MCKENZIE LLP
101 West Broadway
12th Floor
San Diego, CA 92101
(619) 236-1441

Counsel for Petitioners

* *Counsel of Record*

FILED
AUG 24 2005
OFFICE OF THE CLERK

(2)

No. 04-1590

IN THE

Supreme Court of the United States

MAXIM PHARMACEUTICALS, INC.,
LARRY STAMBAUGH and KURT GEHLSEN,

Petitioners,

v.

CROSSPOINT VENTURE PARTNERS 1997, L.P., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF CALIFORNIA,
FOURTH APPELLATE DISTRICT

SUPPLEMENTAL BRIEF

CHARLES H. DICK, JR.
KATHERINE A. BACAL*
BAKER & MCKENZIE LLP
101 West Broadway
12th Floor
San Diego, CA 92101
(619) 236-1441

* *Counsel of Record*

Counsel for Petitioners

196313

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CERTIORARI SHOULD BE GRANTED IN THIS CASE TO COMPREHENSIVELY RESOLVE THE CONFLICTS AMONG CIRCUITS AS TO THE REACH OF *PRIMA PAINT*

Petitioners file this Supplemental Brief to draw the Court's attention to a similar issue currently awaiting the Court's determination. On June 20, 2005, the Court granted Certiorari in *Buckeye Check Cashing, Inc. v. Cardegna, et al.* to determine whether the Federal Arbitration Act ("FAA") allows a party to avoid arbitration by claiming that the underlying contract containing an arbitration clause (but not the arbitration clause itself) is void for illegality. In seeking this determination, Petitioner Buckeye Check Cashing, Inc. asks the Court to find that the holding of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) is not limited to its facts and, in so doing, affirm the strong policy favoring arbitration.

As in *Buckeye*, Petitioners here seek to have the Court confirm the federal policy in favor of arbitration and resolve a conflict among Circuits as to whether the holding of *Prima Paint* should be limited to its specific facts.[1]

Both petitions ask for the Court to confirm that it is for the arbitrator, not a court, to resolve disputes as to the validity of the contract containing the arbitration provision. Both ask the Court to affirm the presumption in favor of arbitration, even where facts differ from those at issue in *Prima Paint.*

---

[1] Certiorari in *Buckeye* was granted after Petitioners filed their Petition for a Writ of Certiorari, and Petitioners did not have access to the *Buckeye* Opening Brief until after their Reply was filed. Thus, this Supplemental Brief comports with Rule 15.7.

At the very least, a decision in *Buckeye* should be highly illuminative to this case.

CONCLUSION

In *Buckeye*, the Court will instruct how severable (and thus enforceable) arbitration clauses are from their underlying contract and thereby clarify whether *Prima Paint* is limited to fraud in the inducement claims. In this case, the Court has the opportunity to settle whether fraudulent inducement claims are subject to contractual arbitration provisions, under the dictates of *Prima Paint*, whether or not an arbitration clause is subjectively "broad." By hearing both petitions, the Court can solidify the federal presumption of arbitrability. Petitioners therefore respectively request the Petition for Certiorari be granted or, alternatively, that the Court enter any relief that it deems just and appropriate under the circumstances.

Respectfully submitted,

CHARLES H. DICK, JR.
KATHERINE A. BACAL*
BAKER & MCKENZIE LLP
101 West Broadway
12th Floor
San Diego, CA 92101
(619) 236-1441

Counsel for Petitioners

* *Counsel of Record*